THE GREAT ALLIANCE
AGAINST
THE PRUSSIAN "STATE"

WITH PAPERS ON
INTERNATIONAL COMMERCE

BY
CARMAN F. RANDOLPH
OF THE NEW YORK BAR

REPRINTED BY
THE NATIONAL MARINE LEAGUE OF THE U. S. A.
1410 H ST., N. W., WASHINGTON, D. C.
18 OLD SLIP, NEW YORK

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The National Marine League reprints Mr. Randolph's papers as interesting comments on matters of public concern, but is not committed to any views or conclusions expressed therein.

"Keep the Flag Flying"

THE NATIONAL MARINE LEAGUE OF THE U. S. A.

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To awaken the people of the United States, whether living on the seacoast or in the interior, to a full understanding of the necessity of re-establishing an American over-seas commercial marine, particularly for the expansion of our commerce with South America and Asia through the Panama Canal.

To formulate measures for this purpose from the standpoint of our national policy and development, and not from that of any special interest.

To promote full recognition of the paramount need of providing world-wide export outlets for the products of our manufacturing industries, that labor and capital may be more steadily and profitably employed.

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Press Notices of Mr. Randolph's "Law and Policy of Annexation, With Special Reference to the Philippines." Published by Longmans, Green & Co., 1901.

Whatever may be the personal opinion of the reader with reference to the situation of the United States in the Philippines and Cuba, he will take real interest in this exposition of an exact and thoughtful jurisconsult.—*Revue de Droit International,* Brussels.

The Law of Eminent Domain, by Mr. Carman F. Randolph, of the New York Bar, is the recognized standard text-book dealing with that branch of private law by which the land of the private individual may be taken for public purposes. * * * With his *Law and Policy of Annexation* Mr. Randolph has accordingly come well equipped to the consideration of the principles and policy of the analogous subject of annexation, a branch of public law under which the State enlarges its territories for purposes of high policy. * * * This is a book which we can confidently commend to politicians and students of public international law and policy. *Westminster Review.*

No one who wishes to understand the controversy that has arisen out of the conquest of Porto Rico and the Philippines can afford to omit reading Mr. Randolph's scholarly and interesting work. *Yale Review.*

The Revue Générale de Droit International Public says: Mr. Randolph's "liberal ideas will not be lost. Their practical value has already been recognized by the press of the United States, and they will beyond a doubt exert great influence on the policy to be finally adopted by the Congress of the United States."

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This is an exceedingly well-reasoned and well-written book. The writer is well known as a lawyer, and his little book is first of all a brilliant legal argument. But it is more. The wide range of reading in the field of civics, and the thorough familiarity with the Constitutional law and literature, not only of the United States, but of European nations, of which he gives ample evidence, distinguish the book as far as possible from the ephemeral political pamphlet, and give it a permanent place as a contribution to Constitutional interpretation. *Law Notes.*

The reader will find gratification in perusing this book. . . . He will admire the author's erudition and find that he is not easily to be confuted. *Journal of the Military Service Institution.*

A learned and able book. *Chicago Tribune.*

An able, valuable and interesting study. *New York Herald.*

The book is an interesting and scholarly piece of work. It is especially valuable from the point of view of the Constitutional lawyer. *Baltimore Sun.*

It is interesting and valuable, not only to those who are in authority and must deal directly with this important question, but to all citizens, who should understand clearly the reasons which underly the actions of their representatives. *American Catholic Quarterly Review.*

It is a work that should be in the hands or at the elbow of every person who undertakes to discuss the question at present uppermost in our national life. *Philadelphia Record.*

The author writes with great learning and conclusive force. *American Law Register.*

This volume is also of general interest to the student of comparative constitutions and comparative and general jurisprudence. * * * The student cannot rise from the perusal of this volume without feeling his views of law widened, and for the benefit of those who wish to pursue the subject further, or to answer the author's arguments, the references to authorities are full and satisfactory. *The Juridical Review,* Edinburgh.

Probably the most learned and careful argument that has been presented to the public. *Albany Argus.*

The work is eminently useful to constitutional lawyers and statesmen. *Asiatic Quarterly Review.*

His views are not those of any party or faction, but the independent opinions of a man learned in the law and inspired with unaffected patriotism. *Washington Post.*

Whoever would see the plain truth on these great issues presented in all its force, but calmly, without exaggeration and in a high form of literary expression, should read and ponder Mr. Randolph's second chapter. Space will not permit a full or even hasty analysis of the remaining chapters of this timely and able work. It must suffice to say that they are crowded with thought, argument, history and precedent, but above all are marked by an admirable moderation of statement and fairness of judgment. *Springfield Republican.*

This is a volume which deserves to be read with care by all who take an interest in the foreign policy of the United States. *Law Magazine and Review,* London.

It presents the most complete view, as well as the best discussion, of all the issues and all the arguments connected with our present annexation of new land. *Boston Transcript.*

Throughout, the discussion is keen, logical, lucid. *Chicago Evening Post.*

A clear and authoritative work. *Denver Republican.*

The book is written in a calm and temperate style, yet from deep convictions—convictions which the reader finds it difficult not to share. *Virginia Law Review.*

A strongly written Constitutional argument. *Boston Herald.*

Although a lawyer, Mr. Randolph seems strongly inclined toward plain common-sense and justice. *Life.*

This seems to cover a large field and certainly a most absorbing one. That Mr. Randolph has made an earnest and careful study of it is his right to a hearing, and whether his conclusions are accepted or not, his suggestions are illuminating and in every way worth considering. *St. Louis Globe-Democrat.*

The Churchman, premising that many of its readers will disagree with some of the author's conclusions, says: "But, however, they may disagree, they will pay willing tribute to the calmness and judicial character of his reasoning, to the legal skill with which he unfolds his arguments, and the excellence of its construction."

The subject of Mr. Randolph's book is one of great moment at the present day, and however we may choose to look upon the question of annexation or alienation, a treatise so well written and containing so much thought is one which commends itself to the true-spirited American citizen. *Yale Law Journal.*

A rare example of an admirably balanced, temperate and judicial inquiry into the foreign policy of the United States. *Philadelphia Public Ledger.*

This book deals soberly and seriously with a subject of great legal and practical importance. *Solicitors' Journal,* London.

Morristown, New Jersey.
May 7, 1917.

Mr. P. H. W. Ross,
President of the National Marine League
of the U. S. A.

My dear Mr. Ross:

The Republic in arms for democracy is good reason for prefacing this collection of briefs and newspaper communications on commercial subjects by a war paper; and, when the Great Alliance shall have cut out the cancerous Prussian "State," intercourse among the nations, in a world made "safe for democracy," should rise to progressively higher levels.

While the commercial papers in this collection say little of the League's effort for an American merchant marine that shall promote our foreign trade, strengthen our navy and encourage the shipbuilder's art, they reinforce the effort by examining our commercial treaty system with an eye to its approaching readjustment to new and better conditions, by commending export combinations, so improvidently discouraged, if not forbidden by our laws, and by urging invigoration of the railway system, which is as essential to our seaborne, as to our inland trade.

I appreciate the complimentary reprinting of these fragmentary, but not unconsidered papers, I hope they may forward the League's admirable work, begun prior to the great war and now spurred by duties and opportunities attending our participation and, trusting that you and your associates may win for the seafaring ship the widespread interest which, when expressed in apt legislation, will permanently establish an adequate merchant fleet, I remain,

Sincerely yours,
Carman F. Randolph.

THE GREAT ALLIANCE

April 29, 1917

To the Editor of The New York Times:

Making war against Germany, the United States makes with the Entente Powers a spiritual alliance cemented by democratic ideals, a working alliance enlisting our financial aid and whatever reinforcement on sea and land shall speed a victorious peace. The Great Alliance is a fact. Should it crystallize into form?

A formal alliance is not discouraged by the familiar warning regarding Europe in Washington's Farewell Address—that "it must be unwise to implicate ourselves by artificial ties in the vicissitudes of her politics or in the ordinary combinations or collisions of her friendships or enmities." This broad counsel is followed by the shrewdly discriminating advice "'Tis our true policy to steer clear of permanent alliance with any portion of the foreign world. * * * Taking care always to keep ourselves by suitable establishments on a respectably defensive posture, we may safely trust to temporary alliances for extraordinary emergencies." An extraordinary emergency now makes an alliance permissible. What considerations of fact, of law, of diplomacy bear on the question of its expediency?

At London on November 30, 1915, the British Foreign Secretary and the Ambassadors accredited to Great Britain by France, Italy, Japan, and Russia signed on behalf of their respective Governments an agreement whereby these Governments "mutually engage not to conclude peace separately during the present war. The five Governments agree that, when the terms of peace come to be discussed, no one of the Allies will demand conditions of peace without the previous agreement of each of the other Allies." An agreement of like tenor had been made in September, 1914, by Great Britain, France, and Russia, to which Japan adhered in October.

To pledge the United States to this Compact no authorization by Congress is needful; nor the Senate's approval, as for a treaty. While the instrument ranks with a treaty in honorable obligation, it is essentially a military measure—an executive agreement. The President could sign this Compact in virtue of his right, nay, his duty, as Commander in Chief, to make, if circumstances warrant, an agreement with brothers in arms that will at once solidify the striking power of the entire group and avert the possibility that withdrawals of recalcitrant members might leave the Republic in the lurch—a precaution happily of academic interest in the present case. While upholding the competency of the President to engage the Republic in a formal military alliance, and not ignoring

possibilities in this direction, I believe our adhesion to the Compact of London would be impolitic, both from our standpoint and that of the Entente.[1]

The "peace" which, according to the Compact, the signatories purpose to "conclude" and the "terms" and "conditions" thereof all point to an agreement marking the end of the war. Could the German Government stalemate a hostile world, the war might end with an unconditional truce, followed by a Congress of Nations wherein that Government might cleverly drown some of the burning issues of the great war in the sea of a very broad discussion, and, playing off one nation against another, emerge at least first among equals, with the Prussian "State" encouraged to renew its sinister pretensions to dominance.

No stalemate now! The Entente Powers are well on the way to a victory intensified by the support of the United States—to conquest, if the Prussian "State," obstinate alike to the Great Alliance and to the interests of the German people, will have it so. In what environment and with what purposes shall peace conditions be actually imposed?

There is in the world a multitude addicted to noisy self-expression, hailing every "convention" as an event, every "resolution" an achievement, and coveting the badge of the "delegate" as an emblem of distinction. " 'Everything among them talketh, nothing succeedeth any longer and accomplisheth itself. Everything cackleth, but who will still sit quietly on the nest and hatch eggs?' Thus spake Zarathustra." This multitude dreams of a Peace Congress which, guided, if not invaded, by organized pacifists, philanthropists, socialists, feminists, sociologists, et cetera, shall resolve the problems of the world, and disperse in a storm of self-applause. Fantastic! Yet mighty forces surge beneath the froth. The great war will be ended and followed by agreements whose negotiators, keen and sophisticated though they must be to secure a worthy and durable settlement, will perform their patriotic services with an unprecedented appreciation of moral and humane purposes.

We may expect a Congress of Nations after the conclusion of peace. Probably some of the problems of the war will necessarily

[1] As printed in the "Times" of April 29, the paragraph reads as follows:

"No authorization by Congress is needed; nor the Senate's approval, as for a treaty. While the Compact ranks with a treaty in honorable obligation, it is essentially a military measure—an executive agreement. Emphasizing the right of the President to sign the Compact of London our adhesion would be impolitic, both from our standpoint and that of the Entente.

"The President could sign this Compact in virtue of his right, nay, his duty, as Commander in Chief, to make, if circumstances warrant, an agreement with brothers in arms that will at once solidify the striking power of the entire group and avert the possibility that withdrawals of recalcitrant members might leave the Republic in the lurch—a precaution happily of academic interest in the present case."

be referred to it for final settlement, but a just assurance of concrete results demands their accomplishment in the very conditions of peace imposed by victors sufficiently powerful to make these conditions effective, sufficiently wise, magnanimous—aye, compassionate —to make them bearable by the defeated peoples.

The aims of the Entente Powers and those of the United States will not be discordant. Conference, sincere and intimate, will not only avert this mischief, but bring reciprocal toleration in matters whereon formal agreement may be unattainable or undesirable. But these aims are, apparently, not entirely identical, nor need they be pressed to identity by mutually reluctant compromises, for it will appear that the variations are quite natural and need not impair the essential unity of method and purpose.

President Wilson said in his memorable war address of April 2: "We desire no conquest, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make." To this self-denying ordinance, so rightfully proclaimed, the outraged neighbors of Germany do not subscribe. They have heavy scores to settle, new boundaries to draw, neighborhood problems to adjust; and the "balance of power" purged of dynastic ambitions will concern far-sighted statesmen. The Republic will neither formally commit itself to such aims as these, nor dissuade the Entente Powers from pursuing them.

We are not surprised, though none the less gratified, to know that at present no formal alliance is expected from us. Speaking on April 25 for the Entente Powers, Mr. Balfour said with characteristic felicity of thought and word: "Our confidence in the assistance which we are going to get from this community is not based upon such shallow considerations as those which arise out of formal treaties. No treaty could increase the undoubted confidence with which we look to the United States, who, having come into the war are going to see it through."

Reserving his right to make hereafter such alliances as military exigencies may demand, the President might properly display to the Powers the firm foundation of their faith and pledge the Republic to the course on which it is firmly resolved—linked with the Entente Powers in a common aim of worldwide concern, to fight with them to the end. The pledge might lose point were the aim supplemented by others, however worthy in themselves; and, accomplishing this, the Great Alliance will clear the way for whatever projects may engage their interest. Indeed, our Commander in Chief could not pledge the Republic to any other than a military obligation.

Our common aim and purpose is to uproot the Prussian "State," and we find prophetic justification and I believe a prophecy of success in the words of the great Prussian philosopher. Over a hun-

dred years ago Immanuel Kant, applying to a State his "categarical imperative"—"Act as though the maxim of thy will were to become by thy adopting it a universal law of nature"—defined an "unjust enemy" as

> one whose publicly expressed will, whether in word or deed, betrays a maxim which, if it were taken as a universal rule, would make a state of peace among the nations impossible, and would necessarily perpetuate the state of nature.
>
> Such is the violation of public treaties, with regard to which it may be assumed that any such violation concerns all nations by threatening their freedom, and that they are thus summoned to unite against such a wrong, and to take away the power of committing it.
>
> But this does not include the right to partition and appropriate the country so as to make a State, as it were, disappear from the earth, for this would be an injustice to the people of that State, who cannot lose their original right to unite into a commonwealth and to adopt such a new constitution as by its nature would be unfavorable to the inclination for war. (Eternal Peace, Page 159. World Peace Foundation.)

Following Kant's advice, the Great Alliance will force the displacement of the Prussian "State" by a constitution "unfavorable to the inclination for war"—unless the German people do it first.

April 26, 1917.
165 Broadway, New York.

Carman F. Randolph.

THE GERMAN SHIPS

March 31, 1917

The National Marine League of the United States of America presents these questions: May the United States lawfully take exclusive possession of the German merchant ships lying in our ports? May the United States lawfully assume proprietorship of them without the consent of the owners?

Considering the first question, I note, as matters of common knowledge, the scuttling of one of these ships, to the prejudice of harbor navigation and the perversion of at least one other to the nefarious use of a factory for making bombs intended to destroy ships engaged in our commerce. Without relying specifically on reports of wrecking machinery or of further plottings on board, notorious facts and imperative implications render the whole fleet suspect.

I am of the opinion that the President, acting of his own motion in virtue of his constitutional duty to maintain peace and safety in the United States, may supplant surveillance by control

and take exclusive possession of the entire fleet. The ships are, in theory of law, floating particles of German territory. Entering in peace and during peace, entitled to certain privileges and immunities because of their foreign nationality, their employment as a base of hostilities invites their seizure.

Considering whether the United States may lawfully assume full proprietary rights in ships which, as I have shown, may be lawfully seized, I do not deem it necessary to lengthen this opinion by reciting notable instances of a taking over of German ships during the present war—for example, by Italy and Portugal. I shall deal with our somewhat peculiar case on its own merits. Attention has been called to two articles of our treaty with Prussia of 1799, incorporated in the Treaty of 1828—a treaty sufficiently obligatory upon the German Empire. Article XXIII, reads:

"If war should arise between the two contracting parties the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance; and all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and, in general, all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses nor goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy into whose power by the events of war they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force the same shall be paid for at a reasonable price."

Article XXIV, regarding treatment of prisoners of war, ends thus:

"And it is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this or the preceding article, but, on the contrary, that the state of war is precisely that for which they are provided and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and of nations."

The question is mooted whether the German Government's misconduct toward us has not been so gross as to justify our repudiation of Article XXIII, notwithstanding Article XXIV. I hope and believe we shall not, at the very threshold of war and without imperative cause, declare a reprisal that would sweep away these ancient and wholesome contracts. I hope and believe that, while we do not war against the German Government for its violation of the Belgian guarantees, our abhorrence of this crime and of its consistently horrid sequences will impel us proudly to maintain treaty faith unless absolved hereafter by German violations too sweeping to be borne.

Assuming that when the Republic comes to make a peace with Germany it will be advantaged by a notably clean treaty record, does Article XXIII, forbid the forcible transfer of the German

vessels to American ownership? Even without treaty obligation a just, kindly and tactful policy would permit all well-behaved Germans to go unmolested in person and property during the war period. The article merely makes this policy obligatory for nine months. Emphatically, the article in nowise qualifies the "enemy" status of all Germans or precludes the Government from taking precautionary measures in their regard. For example, all Germans may be listed and required to report themselves from time to time; any one refused permission to leave the country when his destination excites suspicion—Mexico for instance; all forbidden to trade with our enemy. While a wholesale and arbitrary internment is barred by the article we are more than willing to leave at liberty those whose conduct or affiliations do not make them suspect. In short, the German who does not abuse our hospitality has nothing to fear, and if his land or his chattels are taken for public use, either warlike or peaceful, no treaty contract is needed to assure him just compensation.

Coming to the German ships a close analysis of Article XXIII, might perhaps exclude them from its purview, but I might concede their inclusion, under a liberal rule of treaty interpretation, without affecting my conclusion in their regard. I am of the opinion that the United States may fully appropriate the ships if only because of the sinister conditions which amply warrant their seizure and the ouster of their German custodians. Not only are they technically "enemy" property, they are actually hostile property. I assume the United States will pay to the owners whatever compensation may be hereafter determined to be justly due.[1]

OPINION
ON THE ANTI-TRUST ACT AND EXPORT TRADE: WITH A NOTE ON THE "RULE OF REASON"

May 19, 1914

I.

The remarkable increase in our exports of manufactures in recent years—worth nearly twelve hundred million dollars in the fiscal year ending June 30, 1913—brings widespread satisfaction and to merchants a healthy desire to better an improved position.

That this increase has come without the government backing, without even the government encouragement so largely given to many of our foreign competitors, emphasizes the natural vigor of the movement and the hope for its progress.

To better our position, however, perhaps even to hold it against the redoubled efforts to which our advance will inspire our national competitors requires from the government something more than good will, though decidedly less than artificial stimulation.

A good beginning has been made in the provision (S. 25) of the Federal Reserve Act that a national bank with a million of

[1] This opinion was printed in the New York "Times" April 6, 1917, prior to publication in the April number of "The Navy and Merchant Marine."

capital and surplus may establish "branches in foreign countries and dependencies of the United States for the furtherance of the foreign commerce of the United States."

Whatever may be advisable by way of public encouragement of export trade, and I believe there is much, it should be unthinkable that our laws are even open to the suspicion of forbidding any expedient method of promoting it.

Yet business men entertain sufficient doubt of the validity of export associations under the Anti-Trust Act to prevent the employment of this, in some cases, advantageous method of marketing commodities abroad to their own and their country's profit. This method has, for years, been a strong weapon in the hands of our rivals. It should now be recognized here because having turned away from the policy of high protection, we must remove all barriers to our competition in the world's markets—Let the openings in the tariff wall be for exit as well as for entrance.

In what industries and to what degree export associations will be useful and feasible is for business men to determine, though there is evidently an important field of operation. Business men, who have suggested recourse to associated effort, will demonstrate its advantages, and among the important subjects discussed at the forthcoming Export Convention in Washington we may expect that on this one there will be developed a liberal policy of wide acceptance.

The initiative properly comes from producing and manufacturing interests. These, supported by railway and banking interests, must take the laboring oar in demonstrating, now, the need and creating, later, the methods. But, as any method worth considering must square with our anti-trust policy, the legal problems demand early attention.

Discussion of all these problems would carry us into those practical details which should be taken up after general principles have been developed, so I shall for the present, consider only the primary question—whether, or how far export associations may operate, or be allowed to operate consistently with our duty to foreign nations and with our own welfare.

II.

Is there an unlawful or an improper discrimination against friendly nations in allowing or even encouraging our people to sell, mediately or immediately, in their markets commodities produced or assembled under conditions forbidden for the home market? Anything contrary to international law or comity? Certainly not to international law. As for comity the most advanced cosmopolitan would hardly criticise this method of strengthening our hands in the strenuous competition for foreign markets. Especially as, of our greatest competitors, Great Britain favors industrial combinations and Germany promotes them with unprecedented zeal.

To the possible objection that our anti-trust policy suggests a moral duty abroad as well as at home the answer that each nation must look out for itself expresses sound law and not cynical indifference. Economics are not dissociated from morals but the

relation of economic morality to monopoly, competition, free trade, protection, export bounties, ship subsidies, etc., is for each nation to determine and the collective determinations disclose sharp contrasts.

I have put the international question simply to dispose of it. Had all reference to foreign commerce been omitted from the Anti-Trust Act or had contracts or combinations in restraint of import trade been singled out there would have been no breach of duty toward other nations. So there will be none if now, we recognize export combinations.

In fine our legal problems extend no further than the jurisdiction of the Anti-Trust Act—the territory of the United States.

III.

The sole purpose of an export association is to sell, mediately or immediately, domestic commodities in foreign markets. The main purpose of the Anti-Trust Act is to protect consumers from monopoly prices—What consumers? Do these include persons in foreign countries?

The Act embraces "foreign," as well as "interstate" commerce, but, as every transaction in the first branch begins or ends abroad, it is evident that our statute cannot govern it in its entirety.

We need not determine whether the Act may be effectively applied to international transportation.

As to importation, articles brought into the country are, of course, subject to the Act and in this relation we note that the "Act to raise revenue," etc., of August 15, 1894, as amended Feb. 12, 1913, contains provisions respecting trust-made articles and their importers.

But the prohibitions of the Act cannot reach out to the production assembling and transportation in foreign territory of articles sent hither, though these processes be monopolistic. For it is the universal, the self-evident rule that the laws of one nation cannot regulate the policy of another.

In the matter of our exports this rule naturally works in reverse order—the prohibitions of the Act do not affect the handling of our commodities in the foreign market.[1]

Since the consummation of an export association's purpose—sale in a foreign market—is beyond the reach of our statute, it would be absurd to argue that the mere inception of the purpose in this country initiates a conspiracy in restraint of trade.

I conclude that the purpose of an export association is from beginning to end beyond the purview of the Act.

The Act's unconcern with the purpose covers the price arrangement which promotes it and thus relieves the association from what, in the domestic market would, presumptively at least, condemn it. Taking then, as we justly may, the purpose as the primary and principal test of status we find the association inoffensive unless—and here is the critical question—it seeks to execute the purpose by unlawful means—that is to say by imposing an undue restraint on domestic trade in the course of producing or assembling commodities for export.

[1] See American Banana Co. *v.* United Fruit Co. 213 U. S. 648.

These preparatory processes are within the jurisdiction and we now consider their relation to an Act at last rationalized by the famous "rule of reason" applied by the Supreme Court in the Standard Oil and the American Tobacco Cases.

The rule establishes "that only such contracts and combinations are within the [Anti-Trust] Act as, by reason of intent, or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade" (Nash v. United States 229 U. S. 376).

As this rule has been misunderstood in some quarters and in others maligned we demonstrate broadly its high standing and its wholesome effect—referring to a note for a particular discussion of pertinent decisions.

Our discussion of Supreme Court decisions disposes of the charge that the declaration of the "rule of reason" upset a sound and established interpretation of the Act and we have only to mark the effect thereof.

In each of the foreign decisions cited in the note a contract—alleged unduly to restrain trade—was upheld by the House of Lords. I have not recited the facts, not being concerned to inquire whether or not our Supreme Court would, in like cases, render like judgments. The statesmanlike principle of decision is the point—the appreciation of the many-sided relations of business arrangements to the public welfare, to producers, consumers, manufacturers, workmen. This appreciation, which the Supreme Court abnegated many years ago in dealing mistakenly and literally with the railroads as being the proper and, practically, the sole subjects of the Act, is now made manifest by the application of the "rule of reason."

It is noteworthy that the Supreme Court has, as if in anticipation of a clamor that the general prohibitions of the Anti-Trust Act be clarified or sharpened or multiplied by amendments, strongly maintained their inherent vigor and breadth: "In view of the many "new forms of contracts and combinations which were being evolved "from existing economic conditions, it was deemed essential by an "all-embracing enumeration to make sure that no form of contract or "combination by which an undue restraint of interstate or foreign "commerce was brought about could save such restraint from con-"demnation." (U. S. v. Union Pacific R. 226 U. S. 85.)

Without now discussing the numerous amendments suggested—some bad, some specious, some, perhaps, worth attention—I believe that the practical application of the "rule of reason" by the courts will assure a better protection for the public interest and an earlier adjustment of the relation between government and business, since new law will lead to new litigation.

Passing from the broad use of the "rule of reason" to its bearing upon export associations particular applications must await particular proposals Meanwhile several general propositions suggest themselves.

While the purpose of an association is, as we have seen, wholly inoffensive in itself, in the not inconceivable, though unlikely, event of its execution reacting adversely on domestic prices the prohibitions of the Act would apply.

More importantly, an association must not abuse its buying power to the detriment of producers or employ unfair methods against competitors. Here the "rule of reason" should be notably beneficial; first, because the purpose being lawful the means are peculiarly entitled to relief from technical or petty embarrassments; second, because it may well happen that acts which might impose an undue restraint if confined to the home market would not have this effect if done in producing or assembling commodities for the vast world market.

IV.

Assuming that export association be encouraged and legal principles fairly defined we come to organization and management. And here, over and above the ordinary details, it must be determined whether or to what degree organization and management shall be supervised by the Department of Commerce or other public authority.

On this subject we shall find much that is of interest in certain foreign laws and customs.

V.

Export associations may, in my opinion, be arranged and operated so as to withstand attack in the courts. It remains to be seen whether business men will be inclined to take even the chance of attack. If not, Congress should remove the shadow of doubt by permissive legislation. Either a proviso to the Anti-Trust Act or a clause in a general "Act to promote export trade," comprising whatever provisions the government and men of affairs may deem useful and expedient.

NOTE ON THE "RULE OF REASON"

The "rule of reason," becoming at once a political catchword, suffered misconception at the hands of critic and partisan alike. Each mistook it for a new principle of law—the one as a device to weaken the Anti-Trust Act, the other as suggesting a "practical business" interpretation thereof. In truth the rule is not new; nor is it a principle of law. It is a method for interpreting law as old as the judicial system we inherited from England.

The "rule of reason" is, for the broad purposes of this opinion, sufficiently illustrated in the following extract from the opinion in the American Tobacco Case: "Applying the rule of reason "to the construction of the statute, it was held in the Standard "Oil Case that as the words 'restraint of trade' at common law "and in the law of this country at the time of the adoption of "the Anti-Trust Act only embraced acts or contracts or agreements "or combinations which operated to the prejudice of the public "interests by unduly restricting competition or unduly obstructing "the due course of trade or which, either because of their inherent "nature or effect or because of the evident purpose of the acts, "etc., injuriously restrained trade, that the words as used in the "statute were designed to have and did have but a like significance" (221 U. S. 179).

Mr. Justice Harlan's vehement dissent stimulated a wide-spread notion that the Court not only deliberately reversed the settled interpretation of the Act but had thrust into it a meaning contrary to the intent of Congress and opening the door to grave abuses.

Reversal of opinion there was in a literal sense for the syllabus of the Freight Association Case fairly epitomizes the Court's opinion: "The prohibitory provisions of the [Anti-Trust] Act apply "to all contracts in restraint of trade or commerce without excep- "tion or limitation and are not confined to those in which the "restraint is unreasonable." But the fact is that the "rule of reason" has, so far from unsettling the law to the public injury, settled it to the public benefit.

Enacted in 1890, the Anti-Trust Act first came before the Supreme Court in the American Sugar Case (U. S. v. Knight Co. 156 U. S. 1, 1895). How largely, if not completely the principle of decision in this case eliminated from the Act our multitudinous producing and manufacturing enterprises appears in the Freight Association Case. Answering the plea that the Act did not apply to railroads, the Court said: "To exclude agreements as to rates "by competing carriers for the transportation of articles of com- "merce between the States would leave little for the Act to take "effect upon." (166 U. S. 313, 1896.)

With the expectation, if not for the purpose of assuring to the new statute subjects sufficiently important to render its enactment worth while, the Court gave it the railroad rates to bite on. But the government has, in fact, long realized that the application of the Act to the ordinary making of railway rates would dislocate our transportation system. So from time to time competing carriers file with the Commission schedules whose many identical rates are not mere coincidences.[1]

When a legislature newly asserts a power over subjects defined in general terms the courts, in construing it, are more or less influenced by the character of the subjects. A public power over minors will be more broadly construed than were adults affected. Coming closer to our matter the same may be said of corporations as opposed to natural persons. Arriving at our matter we perceive that the Supreme Court, having in the Sugar Case practically eliminated from the Act the persons, corporate and natural, engaged in production and manufacture, gave, in the Railway Cases, its literal definition of "restraint of trade" with common carrier corporations alone in view.

How deeply the character of the subjects affected the definition appears in the opinion in the Freight Association Case (166 U. S. 335): "Considering the public character of such corporations, the "privileges and franchises which they have received from the pub- "lic in order that they might transact business, and bearing in mind "how closely and immediately the question of rates for transporta- "tion affects the whole public, it may be urged that Congress had "in mind all the difficulties which we have suggested of proving the

[1] The Clayton Anti-Trust Bill (H. R. 15657, S. 7) would formally recognize the rate-making practice so long sanctioned by usage, forbidding, however, the "pooling of earnings or traffic" and "joint agreements" to "maintain rates."

"unreasonableness of the rate and might, in consideration of all "the circumstances, have deliberately decided to prohibit all agree- "ments and combinations in restraint of trade or commerce, re- "gardless of the question whether such agreements were reasonable "or the reverse."

These words would not, indeed they could not, have been used, had the Court been dealing with our industrial enterprises, which have not the public character and function of railway companies. They should not have been used in respect of railroad rates.

Understanding that in 1896 the Court applied the Act chiefly, if not exclusively to corporate common carriers—public service companies—we find that in 1911 the Act had come to embrace industrial enterprise generally. For between these dates the basic proposition in the Sugar Case—"commerce succeeds to manufacture and is not a part of it"—though never squarely reversed, had become so completely upset that in the Standard Oil Case the Court noticed it only by way of a kick in passing, saying of the defendant's argument against jurisdiction, "But all the structure upon which this argument proceeds is based upon the decision in [the Sugar Case]. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this Court in connection with the interpretation and enforcement of the Anti-Trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contention to be plainly foreclosed and to require no express notice." (221 U. S. 68.)

It is this upsetting of once supposedly settled law, which is ignored by carpers at the rule of reason, that constitutes the significant reversal in anti-trust jurisprudence which necessitated the technical reversal that raised so great a clamor.

Here are the simple facts of the matter: The Supreme Court of 1911 looking back upon fifteen years of earnest effort justly to interpret an unprecedented Act, presenting unusual difficulties, and realizing that a helpful interpretation must square with real conditions declined to afflict the general industry of the country by maintaining a narrow and a rigid interpretation which the Court of 1896, misled by the false start in the Sugar Case and with little experience, had made for railway rates—but had proved to be inoperative even as to these.

The need for reinterpreting the Anti-Trust Act by the "rule of reason" being demonstrated, what of its future application?

Since the Tobacco Case the Supreme Court has not been called upon to apply the rule in a marked way, but I cite the foreign decisions referred to in the above opinion as indicating the true spirit of interpretation.[1]

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[1] In the King *v.* Northern Associated Collieries (14 C. L. R. 463) Judge Isaacs of the High Court of Australia observed that for many years *dicta* had fallen from the American courts that "restraint of trade" was "to be "taken in an unqualified sense, and that all such contracts were stamped with "illegality whether reasonable or unreasonable, whether beneficial or detri- "mental to the public." He went on to say that in the American Tobacco Case the Supreme Court held that "the legislature had not rigidly invalidated "all contracts in restraint of trade," but intended to set up "the standard of

In Northwestern Salt Co. v. Electrolytic Alkali Co. (30 Times Law Report, 313 Feb. 12, 1914) the House of Lords gives the latest authoritative deliverance on restraint of trade at common law.

"Unquestionably the combination in question was one, the "purpose of which was to regulate supply and keep up prices. But "an ill-regulated supply and unremunerative prices might in point "of fact be disadvantageous to the public. Such a state of things "might, if it was not controlled, drive manufacturers out of busi- "ness, or lower wages, and so cause unemployment and labor dis- "turbance. It must always be a question of circumstances whether "a combination of manufacturers in a particular trade was an evil "from a public point of view. The same thing was true of a sup- "posed monopoly. In the present case there was no attempt to "establish a real monopoly, for there might have been great compe- "tition from abroad or from other parts of these islands than the "part which was the field of the agreement."

The Lord Chancellor "did not think that consistently with the "principle of Attorney Gen. v. Adelaide Steamship Co. (1913) A. "C. 781, a court of justice was at liberty to infer from the terms "of the contract in controversy that it was directed to establishing "either a pernicious monopoly or a state of things injurious to "the public" and he agreed with Lord Justice Lindley in Maxim-Nordenfelt Co. v. Nordenfelt (1893) 1 Ch. 646, "The interest of "the public is no doubt adverse to monopolies and restraints of "trade; but then its interest is to allow its members to carry on "those businesses which they themselves prefer, and to abandon and "sell to the best advantage those businesses which for any reason "they do not wish to continue."

The Adelaide Steamship Co. decision referred to by the Lord Chancellor is not as important for my present purpose as is the Salt Company decision for the former construed the Australian anti-trust act which forbids combination, etc., to the "detriment of the public," while the latter applies the common law rule concerning restraint of trade, but the following citation is of interest. "The chief evil thought to be entailed by a monopoly, whether in "its strict or popular sense, was the rise in prices which such "monopoly might entail. The idea that the public are injuriously "affected by high prices has played no inconsiderable part in our "legal history. . . . Although, therefore, the whole subject may "some day have to be reconsidered, there is at present, ground for "assuming that a contract in restraint of trade, though reasonable "in the interest of the parties, may be unreasonable in the interests

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reason" which had been applied at common law and in America in dealing with the subject embraced by "the statute."

Referring to the Australian Industries Preservation Act, which forbids restraint of trade, etc., "to the detriment of the public," the judge said, "The "Commonwealth legislature, having before it the American statute and the "earlier expressions of judicial opinion which had fallen from the American "courts, inserted in the Australian Act its own express limitation in the words referred to" and he added that the American qualification—the rule of reason—"may be found to be just what has been inserted in the Austra- "lian Act."

The Adelaide Steamship Case, cited later, is this case on appeal.

"of the public if calculated to produce a pernicious monopoly, that "is to say, a monopoly calculated to enhance prices to an unreason- "able extent. In this connection it should be noticed that monopo- "lies in the popular sense of the word are more likely to arise, and "if they do arise, are more likely to lead to prices being unreason- "ably enhanced in countries where a protective tariff prevails than "in countries where there is no such tariff" (1913 A. C. 796).

A BRIEF ON THE COMMERCIAL TREATIES OF THE UNITED STATES

July, 1915

I.

The nations appear to be at the threshold of an era of unprecedented activity in the making and revising of treaties, so seriously has the war dislocated the system of international contracts affecting the entire Eastern Hemisphere. And the Western Hemisphere cannot be unconcerned. How far the distinctively political phases of this new treaty making will affect the United States remains to be seen. The commercial phases will deeply concern us and may to a substantial degree invite our active participation.

We appreciate how greatly the war affects the net-work of international commercial arrangements. We realize that in this general disturbance there is to us both promise of benefit and threat of injury. Furthermore the war has only emphasized and complicated a national interest in commercial treaties necessarily involved in our movement for export trade in manufactures. If we are urged to "preparedness" for the chance of war we are not less urged to "preparedness" for the certainty of a sharper struggle for trade than we have ever experienced—a struggle wherein commercial treaties and arrangements will play leading parts.

Our diplomacy, however zealous and wise, will better promote our reasonable commercial needs if mercantile and financial interests shall co-operate in the shaping of our policy. Such co-operation involves not only the obvious factor of expert business advice but an appreciation of the legal side of international trade conditions covering such matters as these: Our commercial treaties in force; important commercial relationships among foreign countries; the effect of war upon commercial treaties; the treaty making power of the United States; the powers of other governments; the relation of maritime war to commerce; the novel war legislation in regard to commerce; navigation laws; trade with colonies and protectorates, etc., etc.

Each of these topics has suddenly become of unprecedented concern to our commercial interests and it is, I take it, with the thought of contributing something to the legal side of the work of preparation that I have been asked to prepare a brief on the first and the simplest topic.[1]

[1] Prepared for The National Foreign Trade Council, 64 Stone Street, New York City. [Reprinted here by the courtesy of the Council.]

II.

The following commercial treaties are presumably in force since neither party has given due notice of abrogation to the other:[1]

Argentine Republic 1853, Austria-Hungary 1829, Belgium 1875, Bolivia 1858, *China* 1903, Colombia 1846, Costa Rica 1851, *Cuba* 1903, Denmark 1826, Egypt 1884, Ethiopia (Abyssinia) 1903, *France* 1822, *Great Britain* 1815, Greece 1837, Honduras 1864, *Italy* 1871, *Japan* 1911,[2] Liberia 1862, Morocco 1836, Netherlands 1852, Norway 1827,[3] Ottoman Empire 1830,[4] Paraguay 1859, Persia 1856, *Prussia* 1828, Servia 1881, Siam 1856, Spain 1902, Sweden 1827,[3] Tonga 1886.

The following treaties have been terminated by notice from the United States—the second date being that of notification: Switzerland (articles relating to commerce) 1850, 1899, Russia 1832, 1911.

The following have been terminated by notice from the foreign state: Brazil (only for articles relating to commerce and navigation) 1828, 1841, Chile 1833, 1850, Dominican Republic 1867, 1898, Ecuador 1839, 1892, Guatemala 1849, 1874, Hayti 1864, 1905, Mexico 1831, 1881, Nicaragua 1867, 1902, Peru 1887, 1899, Portugal 1849, 1892, Salvador 1870, 1893, Venezuela 1860, 1870.

We have never concluded a commercial treaty with Rumania or with Uruguay and with Bulgaria only a reciprocity arrangement (1906-1909) under the Tariff Act of 1897.

The Sixty-third Congress, for the purpose of readjusting the present duties on importation and to encourage export trade authorized the President to negotiate, subject to its approval, trade agreements with foreign countries looking toward freer trade relations and further reciprocal expansion of commerce (Tariff Act 1913, Section 4A). Whether or how far this provision shall be utilized remains to be seen.

The same Congress, so keen in its first session to promote our foreign trade by means of special treaties, did at the end of its term jeopardize many of our most important general treaties seemingly oblivious of that peculiar need of holding fast to what we have in this time of stress and confusion.

Sections 16 and 17 of the Seamen's Act March 4, 1915 (La Follette Act) direct the President to notify, within ninety days,

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[1] Certain treaties which are fairly typical of our international commercial contracts are given in an appendix. For convenient reference they are italicized throughout the brief. [The appendix is not reprinted here.]

[2] When, in 1905, Japan assumed control of Korea, she expressly undertook "to see to the execution of the treaties actually existing between Korea and other powers" (I Malloy's Treaties 335). This applies to our treaty of commerce with Korea 1882.

[3] When Sweden and Norway dissolved their Union in 1905 each state, through its Minister at Washington, informed our government that it deemed treaty obligations theretofore jointly assumed to continue in force (Malloy's Treaties II, 1300, 1724). In this category is our commercial treaty with Sweden and Norway 1827.

[4] President Cleveland said in his annual message of 1885 that while there is question as to the sufficiency of the notice of termination of the Treaty of 1862 by Turkey, the commercial rights of our citizens in Turkey come under the favored nation guarantees of the Treaty of 1830. (Moore, International Law, V, 800.)

every government with whom we have made a treaty agreement giving the aid of our public authorities in the arrest and imprisonment of foreign seamen who shall desert from their ships in our ports that all such agreements will terminate upon the expiration of the period designated in each treaty for termination after notice.

In pursuance of this Act the President did on June 3, 1915, give the prescribed notice to many governments.

It is a diplomatic commonplace that whichever party first moves to abrogate part of a treaty puts the whole at risk. The other party is entitled to treat all the provisions as interdependent. Whether it shall meet the move by acquiescence or by notice either of a compensatory alteration or of complete abrogation depends on circumstances.

III.

The following analysis of the more significant provisions supplemented by the selected texts in the appendix will, I think, give a sufficient idea of the spirit of our commercial treaties for the purpose of this brief.

(a)

Considering the personal side of international commerce the legal position of an American trader in a foreign country is, as a rule, fairly satisfactory. Unsatisfactory conditions usually suggest political complications, which are beyond the purview of this brief.

We need not list the conventional treaty provisions according personal privileges to foreigners, but we note in two of our recent agreements an express recognition of the private corporation as an international trader.

In our recent commercial treaty with *Japan, 7*, each country authorizes such private corporations of the other as may be lawfully admitted to do business to exercise their rights and appear in the courts. Our special convention on the same subject with Russia, 1904, is of like tenor and accords the most favored nation treatment. The third paragraph says the agreement "has no bearing upon the question whether a society or corporation organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the regulations in this respect existing in the latter country." The Senate consented to the agreement on the expressed understanding that these "regulations * * * refer to and include on the part of the United States the regulations established by and under the authority of the several States of the Union."

(b)

The treaty provision which, though not wholly confined to commercial affairs, is most conspicuously employed in their regard is the one whereby each party accords to the other the treatment which is or shall be accorded in a like matter to that nation most favored by it in another treaty—the "most favored nation" rule.

The "intent" of this provision is, said Secretary Sherman, "to secure for the contracting party equality with all competing nations in the conditions of access to the markets of the other. This

meaning is usually expressed substantially in the language of articles I and IV of the treaty (1826) between the United States and Denmark; articles V and IX of the treaty (1828) between the United States and *Prussia;* articles VI and XXIV of the treaty (1871) between the United States and *Italy;* and articles III and IV of the treaty (1853) between the United States and the *Argentine Confederation* (Moore, International Law, V, 278).

Agreeably to the spirit of these standard clauses the United States have, on occasion, declined to extend "most favored nation" treatment when this has been accorded for a special consideration not given by the state asking the favor.

"Most favored nation" treatment is broadly accorded in respect of "commerce and navigation" in our treaties with the *Argentine Republic* 3, Austria-Hungary 9, Bolivia 2, Colombia 2, Costa Rica 3, Denmark 1, Honduras 3, *Italy* 24, *Japan* 14, Liberia 6, Paraguay 3, *Prussia* 9, Siam 9; in respect of "import duties and navigation" in Belgium 12. In Morocco, 14, our commerce is on the same footing as that with Spain or the nation most favored for the time being and it enjoys most favored nation treatment in the Ottoman Empire, 1, 3, 7.

The principal special application of the most favored nation provision relates to imports and exports of merchandise.

The provision is applied to import and export duties and to export prohibitions in *Argentine Republic* 4, Bolivia 6, Costa Rica 4, Colombia 5, Denmark 4, Egypt 2, *Great Britain* 2, Honduras 4, Paraguay 4, *Prussia* 5, 6; to import and export duties, Austria-Hungary 5, Persia 4, Servia 6; to import duties *China* 5.

Because of our peculiar connection with *Cuba* the treaty of 1903 contains a reciprocal free list of imports and a schedule of preferential duties.

(c)

Each party recognizes as vessels of the other all those which are recognized as national vessels by the state to which they belong: *Argentine Republic* 7, Belgium 7, *Italy* 17, *Japan* 10, Paraguay 7, Spain 11.

The laws of the United States bar foreign vessels from the coasting trade.

Such trade is accorded most favored nation treatment in Belgium 4, reciprocally reserved in Austria-Hungary 7, Greece 5, Honduras 2, Norway 6, Prussia 7, Sweden 6, and also in *Italy* 7, 8, Netherlands 4, *Japan* 13, Spain 9, where it is explained that the reservation does not preclude a foreign vessel from discharging inbound or loading outbound cargo at more than one domestic port.

Apart from coasting trade our treaties broadly intend, as a rule, to put foreign and domestic ships on an equal footing.

Equality is, for example, prescribed in respect of such things as tonnage dues, port charges, etc., etc. *Argentine Republic* 5, Austria-Hungary 2, Belgium 3, 4, Costa Rica 5, *Great Britain* 2, Greece 7, Honduras 5, *Japan* 9, 11, Netherlands 3, Norway 2, Paraguay 5, *Prussia* 2, Spain 7, Sweden 2.

Again it is, in the following treaties, agreed that goods imported or exported in national ships shall have no preference in

the matter of duties over those carried in foreign ships: *Argentine Republic* 6, Austria-Hungary 3, 6, Belgium 5, 6, Costa Rica 6, Denmark 3, *Great Britain* 2, Greece 4, Honduras 6, *Italy* 5, *Japan* 8, Liberia 3, Netherlands 1, Norway 3, 4, Paraguay 6, *Prussia* 3, 6, Spain 8, Sweden 3, 4. Colombia 4.[1]

(d)

Reciprocal protection for trade marks, patents, etc., has come to be an important subject in international agreements.

Considering collective agreements we first note the Industrial Property Convention signed at Washington, June 2, 1911. The gist of this agreement is that "the contracting countries constitute a state of union for the protection of industrial property." "(1) The subjects or citizens of each of the contracting countries shall enjoy in all the other countries of the Union, with regard to patents of invention, models of utility, industrial designs or models, trade-marks, trade names, the statements of place of origin, suppression of unfair competition, the advantages which the respective laws now grant or may hereafter grant to the citizens of that country."

The Convention has been ratified by the United States, Austria-Hungary, Dominican Republic, Spain, France, Great Britain, Italy, Japan, Mexico, Norway, Netherlands, Portugal, Switzerland, Tunis and Germany.[1]

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[1] I note here, without opinion or discussion, the bearing upon treaty provisions guaranteeing equality of duties on goods whether carried in national or in foreign ships of The Tariff Act of 1913. "That a discount of five per centum on all duties imposed by this act shall be allowed on such goods, wares and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided* that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation" (section 4, J. 7).

Certain importers claimed the discount for goods imported in foreign ships. In a test suit this claim was denied by the Board of General Appraisers but it has been upheld by the Court of Customs Appeals ("Five per cent. cases" May 26, 1915). The Court found that the act allowed immediately a five per cent. discount on all goods in American ships. It found also that the act distinctly maintained the obligation of the treaty provisions in question. It held, therefore, that these provisions, if not automatically then by way of incorporation in the statute, allowed a like discount on goods in foreign vessels.

A dissenting judge viewed the statute from a different angle. Apprised by its legislative history that Congress desired to develop an American merchant marine by a system of preferential duties and that it also intended to maintain the treaty provisions in question he concluded that the desire was not acute but was to be realized if or when the provisions should be abrogated.

In short the prevailing opinion would squelch the desire by allowing the discount in the case of foreign, as well as of American ships; the dissenting opinion would, by withholding the discount from both, emasculate it by indefinite postponement.

The case goes to the Supreme Court. Unless the Court finds a way out it will have to decide whether Congress has unwittingly effected a substantial and most unwelcome reduction of revenue or has carelessly enacted a pointless provision. [On March 6, 1917, the Supreme Court, reversing the lower tribunal, construed the statute as allowing the discount only in the event of the termination of the treaties in question. The Court acted on the supposition "that Congress was content to indicate a policy to be pursued when possible."—U. S. v. Pulaski Co.]

A Convention signed at Buenos Aires August 20, 1910, by the delegates to the Fourth International Congress of American State has for its object the "protection of trade marks and commercial names." This has been ratified by the United States, the Dominican Republic, Guatemala, Honduras, Panama, Cuba, Nicaragua, Ecuador, Salvador and adhered to by Brazil and Bolivia.

At the same place and time another Convention was signed for the protection of patents of invention, designs and industrial models. "This has been ratified by the United States, the Dominican Republic, Guatemala, Cuba, Honduras, Panama, Nicaragua, Ecuador, Salvador and adhered to by Brazil and Bolivia.

The United States have agreed with other countries for reciprocal protection of trade marks in special conventions with Austria-Hungary 1871, Belgium 1884, France 1869, Great Britain 1877, Guatemala 1901, Italy 1882, Rumania 1906, in the Consular Convention of 1871 with the German Empire and in the general commercial treaties with *China* 9, *Japan* 15, Servia 12.

The United States have made like agreements in regard to patents in special conventions with the German Empire 1909, Guatemala 1906 and in the general commercial treaties with *China* 10, *Japan* 15.

(e)

Of peculiar interest to-day are the provisions in some of our treaties regarding commerce during war.

Liberal rules for the adjustment of private affairs in case of war between the parties are declared in *Argentine Republic* 12, Bolivia 28, 29, Colombia 27, 27, Costa Rica 11, Honduras 11, *Italy* 21, Norway 17, Paraguay 13, *Prussia* (1799) 23, Sweden 17.

Most of the provisions deal with neutral commerce in maritime war.

A strict rule of blockade is declared in Bolivia 18, 20, Colombia 18, 20, *Italy* 13, Norway 17, Sweden 17.

Reasonable regulation of visit, search and seizure obtains in Bolivia 19, 21–24, Colombia 19, 21–24, *Italy* 18, 20, *Prussia* (1799) 13–15.

The rule "free ships free goods" is affirmed in Bolivia 16, Colombia 15, *Italy* 16, *Prussia* (1785) 12, Russia special convention 1854.

Detailed lists of contraband are agreed upon in Bolivia 18, Colombia 17, *Italy* 15, *Prussia* (1799) 13.

IV.

A survey of our foreign commercial relations, from the treaty standpoint, shows a couple of states with whom we have never signed a regular commercial treaty and a number whose treaties with us have been terminated.

With most countries, including nearly all of first importance, we have treaties old and new, simple and elaborate.

Considering these treaties as a whole we remark a general, though not perhaps a complete agreement on what may be called the standard provisions according national or international equality of treatment in respect of various subjects.

As for the provisions generally the differences, while in some respects highly significant, are, broadly speaking, outweighed by substantial likenesses—likenesses which, not uncommonly, overrule textual differences that, were these great international agreements construed with the nicety of private contracts, might suggest substantial ones: Particularization of privileges in one treaty does not necessarily argue less favorable treatment under another couched in broader terms.

Considering the real function and value of a commercial treaty it goes without saying that a treaty text will no more indicate the tone of our intercourse than it will the actual state of our trade.

Indeed, apart from the few nations whose conditions seem, or did seem at the date of the treaty to require especially strong guarantees, a true comity and the natural currents of trade play, apparently, so controlling a part in the actual trade relation that the distinct utility of a treaty contract is not always sufficiently realized.

Lack of a commercial treaty with any one of the family of nations is, presumably, unfortunate. If it be due to the severance of a bond it argues a breach which should be closed at the earliest proper moment: For, while intercourse may run for years without occasion to refer to a treaty, its existence may time and again assure, as of course, benefits which otherwise might not accrue and emergency may reveal a notable value.

V.

The great war necessitates, at once and on a larger scale, that attention to the commercial treaty which our trade interests have for some time commended.

Our interest in commercial treaties, though centered on our own, neither begins nor ends with these which are but items in a world wide system of interrelated contracts, and we shall better promote our trade relations by appreciating the salient points of this system.

Imperative is the need to avert, by timely repeal of the mischievous clauses of the Seamen's Act, the danger threatening important treaties.

Obvious is the need to fill the gaps in our treaty system.

Beyond these plain requirements is the duty broadly to prepare for whatever trade conditions the war may produce. To this end we should by repeal, amendment, and new enactment bring our legislation for commerce and navigation to a high point of efficiency and consider, with a care hitherto uncalled for, the nature and extent of our treaty making power.

A BRIEF ON THE BEARING OF THE WAR UPON COMMERCIAL TREATIES

January, 1916

I.

Among the responsibilities and opportunities cast upon the United States by the war those involving world trade and finance are not the least important. Nor are they transitory incidents of war. Only at the return of peace will they fully develop.

One of the subjects for our consideration is that body of national laws and international agreements which so powerfully affect the volume and direction of trade—tariff acts, navigation laws, commercial treaties, etc., etc. While these items are so interrelated that none can be neglected without weakening our grasp on the whole situation each calls for special study. And the commercial treaty is sharply differentiated in being an agreement between nations and so within the domain of international law.

Some months ago I prepared for the National Foreign Trade Council a brief on the commercial treaties of the United States. The present brief responds to a request for an opinion on another phase of the great subject of our trade relations—the bearing of the war upon the commercial treaty generally.

II.

A minor, but not an unimportant point has regard to the effect of war upon commercial treaties between belligerents and neutrals.

In case one belligerent occupies territory of another he may deal with foreign commerce regardless of commercial treaties. For his own do not extend to it and his enemy's are inoperative during his occupation. He is in military possession and may bar foreign commerce or keep it open on his own terms.

In case territory passes by war from one state to another the commercial treaties of the former cease to operate therein. Those to which the new proprietor is a party should, in respect of general provisions not plainly inapplicable to the new territory, presumably extend to it. This seems to be the common usage. Where, however, conditions in the new territory are such that an existing treaty could not be extended to it without deranging the policy of the contract either party might be moved to deny its extension or, conceivably, to seek revision of the contract itself. For instance, the products of the new territory might seriously affect the spirit of a tariff arrangement.

III.

Whether, or how far treaty obligations generally are annulled by war between the parties, excepting of course such as are expressly designed to regulate conduct in war, is a question this brief need not fully discuss yet cannot wholly ignore.

The Institute of International Law, after considering the subject for three years, adopted in 1912 a set of regulations on the effect of war upon treaties commencing thus: "I. The opening and conduct of hostilities do not affect the existence of treaties, conventions and agreements, whatever the title and object, concluded between themselves by the belligerent states."

This unconditional statement is materially qualified in the opening paragraph of Rule II: "However, war puts, without notice, an end to the pacts of international associations, to treaties of protectorate, control, alliance, guarantee, subsidies, to treaties establishing a right of pledge or a sphere of influence, and, generally, to treaties of a political nature." [2]

[1] France has taken Tunis under its protection and acts for her in all foreign relations.

[2] I give a translation of the Rules in an Appendix.

The opening rule is evidently based on things hoped for rather than seen. Indeed its advocates frankly admitted this. To substantiate the hope it was ingeniously argued that wars of our time are, happily, differentiated from past conflicts in being waged between organized military forces rather than between peoples. Therefore we should presume the least possible disturbance of treaties. These are contracts between peoples and not between soldiers. When the soldiers stop fighting the peoples resume relations under their old contracts.

This pleasing fancy is blown away by the great war. Never have peoples been so generally mobilized for carrying on war. Never have the miseries of war been so deliberately, so scientifically carried to non-combatants. The war has so developed the very acme of popular effort, of popular suffering that, were the argument sound Europe would emerge from it with every international obligation wiped out—to the sinister advantage of the strongest and least scrupulous states.

There will be no such catastrophe. While much of the treaty fabric will fall much will remain upon which to reconstruct the system.

After purging the Rules of the Institute from fanciful aspirations we obtain this residuum: War does not necessarily break all treaties.

The United States have, on occasion, denied that war necessarily dissolves a treaty contract. Not enlarging upon the most notable instance—our controversy with Great Britain over the effect of the war of 1812 upon the grant to us in the treaty of 1782 of certain rights of fishery—I cite a simple illustration of our position. In the war of 1898 Spain proclaimed the annulment of all treaties between her and the United States. In our commercial treaty with Spain of 1902 all treaties prior to the war are annulled except the treaty of 1834 for the settlement of claims—thus emphasizing the particular proposition that nations do not cancel debts by fighting creditors and affirming the general proposition that whether or not a treaty obligation survives war depends upon the nature of it.

IV.

Whatever the fate of treaties generally the rule for commercial treaties is plain. These contracts regulate intercourse. War breaks off intercourse without regard to time or terms of resumption. The breach carries the contract with it.

In saying that war abrogates commercial treaties I dissent, apparently, from the rules of the Institute which do not except them from the initial presumption that war does not affect treaties. But I have pointed out that this presumption is based upon aspiration rather than on fact and we shall see later how completely, in the case of commercial treaties, the facts rebut the presumption.

V.

As war implicitly closes commercial intercourse between the belligerent states, peace implicitly reopens it, but unless the treaty of peace places it under contract it reopens under "comity"—the

rather vague word which characterizes the uncovenanted amenities which are supposed to smooth intercourse between civilized states.

Now two nations may, in point of fact, maintain a great commerce without treaty contract—what may be called the natural laws of trade operating without written rules other than what either party may see fit to impose by national laws in respect of tariffs, navigation, etc. For example, for years before the war the enormous traffic between Great Britain and Germany flowed without a commercial treaty but Germany extended, from time to time, most favored nation treatment to British subjects and products.

While the absence of a commercial treaty does not necessarily imply either an unfriendly feeling or a negligible traffic its presence generally argues a better relationship in every way.

Taking the civilized world at large it may be fairly said that, with some notable exceptions, the commercial treaty is the normal expression of a friendly intercourse.

VI.

A scrutiny of important peace treaties, since the Peace of Westphalia in 1648 opened the modern era of international compacts, shows how generally they assume the abrogation of prior commercial treaties and how rarely they fail to provide in some fashion for the formal regulation of a resumed intercourse—among the conspicuous exceptions being our treaty of Ghent with Great Britain, 1814, and our treaty of Paris with Spain, 1899.

Frequently the treaty of peace re-establishes in terms a former commercial treaty except as it may be necessarily modified by the terms of peace.

Not infrequently it is provided that, until a new commercial contract shall be negotiated, intercourse shall be governed by the terms of a former treaty or by most favored nation treatment.

Rare, though not perhaps unknown, is the treaty whereby a victor, not content with reaping his fruits once for all, seeks to hold a beaten nation in commercial vassalage. The rarity of the jug-handled treaty may be partly accounted for by its obvious prejudice to neutral interests.

Reviewing modern treaties of peace from the standpoint of commercial intercourse we find that, generally speaking, this is formally renewed upon those terms of equality which, without regard to differences in strength, dignify the relations between truly independent states.

VII.

Whatever may be the relation of the United States to the political readjustments following the war we are too big a figure in international trade and credit to be denied our proper part in reconstructing the world's commerce. And the freedom of our commercial ambitions from militant implications, should make our participation not unwelcome to those nations who would have intercourse renewed on a sounder basis.

In this relation I mark, among the many subjects of our concern, several of those which have been developed or intensified by the war and are bound to figure both in international and in national law.

The definition of "war material," the conditions attending its production and distribution have suddenly become of universal concern.

Brushing aside the delusive, and, because delusive, the pestilent notion of an early disarmament, condemning the exaggeration of "war industries" for the sake of private profit as a noxious offshoot of militarism there remains to these industries an imperative and a legitimate function which the law must wisely conserve. And in the shaping of a sound policy the United States should play a helpful part.

The international standing and function of that great agency of modern industry—the business corporation—have for some time deserved from our men of affairs more attention than they have given. The war renders attention imperative. Already foreign legislatures and courts are dealing with this agency from new viewpoints and we who have so conspicuously developed the corporation in our home affairs are advised to do our share in demonstrating and protecting its legitimate and useful employment in international commerce. Any one who is familiar with the nationally diverse theories and policies regarding the business corporation will perceive both the need for our undertaking and its difficulties.

VIII.

Among the means by which the United States will promote and safeguard their interests in the world's trade is the commercial treaty.

Adequate employment of our treaty making ability demands from our men of affairs a broader vision of our opportunities and a closer acquaintance with foreign practices than, until lately, our situation seemed to call for or, at any rate, evoked. We must go to school—to a post-graduate course in commercial diplomacy.

But we do not go submissively to accept an established scheme. We bring to a scheme distorted by war an inquiring, discriminating, constructive mind. And, for the stimulation of our constructive ability, we bear fine traditions of earlier enterprise in foreign fields and of earlier influence in shaping the law of nations.

Our course in commercial diplomacy covers many things other than the occasional treaty contract, yet the sphere of contract is large for, besides our own activities in this regard, it embraces the agreements which our competitors have made and are making. In this relation we note in the recent convention between Japan and China and the Manchurian arrangement between Russia and China the beginning of a treaty making movement encouraged by the war. Especially are we concerned with the reciprocal threats of the belligerents with regard to commerce after the war and with the suggestion that allies on the battlefield shall become allies in the market. Much of this talk is attributable to present exigencies, more to the mere fury of war, but we must anticipate actual results of tremendous import to our trade.

Considering the terms of our commercial treaties, there is not, nor will there be a model agreement for all nations, so variant are local conditions. But long experience has proved the value of certain broad provisions and the great war is revealing the need of others.

The spirit of the commercial treaties we shall negotiate will reflect the general temper of our intercourse. If to hold our own we must here and there sharpen our points a bit, we must, on the other hand, realize more keenly than ever the necessity of the "give" as well as the "take" in international agreements.

IX.

Considering the treaty making power and opportunity of the Republic I incorporate in this section a newspaper contribution of last October.

The war began by violating a treaty. Automatically it terminated certain treaties between the belligerent countries, and it unsettled basic conditions of treaties everywhere. The war will end with a treaty of peace; and a world-wide struggle for commercial advantage here, for commercial safety there, will be largely recorded in treaties sought for and in treaties signed.

Among the treaty systems of the big commercial countries, that of the United States alone has the war left intact. Yet our lines are not secure. Even before the war, our push for export trade disclosed awkward gaps and defects in our system; and we should realize to-day that, taking it by and large, it will not preserve our interests amid the strenuous bargainings of our competitors. Unless we enter the treaty market, we lose. In these circumstances, we are compelled to scrutinize the constitutional method and extent of our treaty-making power with a solicitude hitherto uncalled for, bearing in mind that, for anything we ask in a negotiation, we must be able to give an acceptable equivalent.

The Constitution forbids any State to make a treaty. It vests the whole treaty-making ability of the Republic in the President, acting with the concurrence of two-thirds of the Senators present. When a treaty is made by the President, who represents the whole people, and by two-thirds of the Senators present, who stand for two-thirds of the States, and to-day, because of the popular choice of Senators, are brought closer to the people, the House of Representatives cannot pose as the jealous guardian of the people's interests, entitled to see that these interests are not impaired by treaties. An exceptional case may warrant protest by the House; policy may, on occasion, dictate its coöperation, as in the existing law in respect of trade agreements; a treaty itself may be expressly conditioned upon the enactment of a complementary statute; but the right to pledge the faith of the Republic to the full extent of constitutional power is confided to the competent hands of the President and Senate.

What, then, is the extent of this power? Not unlimited, as all agree; but from the founding of the Republic the limits have been the subject of dispute between partisans of a broad power and partisans of a narrow one.

Caricature of a broad power depicts the President as proclaiming to an amazed and outraged people such aberrations as a wanton dismemberment of their territory or degradation of themselves to vassalage; or the perversion of their revenue system. Upon such hysterical fancies, upon the treason or folly of a President and Senators, are based the arguments for denying to them the employment of what emergency or opportunity may prove to be reasonable and necessary powers.

This nervous apprehension may be quieted by a simple tonic. A few years ago the Supreme Court extricated itself from a badly working interpretation of the Anti-Trust Act by following the example of that hero of the schoolboy's composition. Lying for years in a loathsome cell, a bright thought struck him. He opened a window and climbed out. Thus did the Court climb to the light by the "rule of reason." The President and Senators will find this rule as true a guide as has the Supreme Court. I cannot imagine them swinging the country from a protective tariff to a revenue one, or *vice versa,* by a set of treaties. I should not be disquieted by their agreeing to relatively slight tariff changes in return for valuable concessions.

Also, let the rule of reason determine the relation of treaty provisions to the police powers of the States—whether a proposed provision would really impair the integrity of a normal and consistent polity, or simply over-ride an idiosyncrasy or an unfair prejudice. For example, I see unreason in smothering a State with undesirable immigrants. I see reason in making and in fulfilling to the letter a Federal obligation to give foreigners here the measure of protection we justly demand for our citizens abroad.

Without now going further into the subject, I maintain that a thorough examination of our treaty power, and its comparison with the powers of our commercial competitors, will demonstrate the ability of the Republic to hold its own in any negotiation looking to its proper advantage and engaging its proper responsibilities.

The need for strengthening our treaty system is urgent. Our constitutional power is ample and now is the moment to apply the power to the need. For, if the great war has brought the emergency, it has given the United States a position of no inconsiderable advantage in dealing with it. Foreigners are thronging our markets for goods and money. Even after the war our credit may avert a financial catastrophe and our aid in the work of reconstruction will surely be sought. From a diplomatic standpoint, we are a most desirable friend, whose overtures looking to reasonable commercial relations should be well received.

Without now considering the striking possibilities the situation may develop, but confining our suggestions to the normal, let us resume treaty relations where these have been broken—with Russia, for example. Let us replace some of our older treaties, made under conditions more or less adverse to our interests, by new agreements. Why not, for instance, exchange with Great Britain and France those broad "most-favored nation" privileges we have with Germany, Italy, Japan, and certain other countries. Still keeping to the normal, but widening our horizon, why should we wait for an international conference of uncertain date and outcome, to consider the "freedom of the seas"? Let us now try to persuade maritime powers to make with us reasonable sea laws, so that, after the war at least, if not before, a substantial gain may be accomplished in this direction.

Not abusing our position by driving unconscionable bargains, let us do what every forward nation should do in our position—press for every fair advantage.

Appendix

Rules concerning the effect of war upon treaties, adopted by the Institute of International Law at Christiania, August, 1912.

Chapter I

Treaties between the belligerent states

I. The opening and conduct of hostilities do not affect the existence of treaties, conventions and agreements whatever the title and object concluded between themselves by the belligerent states.

II. However, war puts, without notice, an end

1. to the pacts [*pactes*] of international associations, to treaties of protectorate, control, alliance, guaranty, subsidies, to treaties establishing a right of pledge or a sphere of influence and generally to treaties of a political nature;

2. to every treaty whose application or interpretation shall have been the direct cause of war as appears by the official acts emanating from one of the governments before the opening of hostilities.

III. To apply the rule established in Article II account must be taken of the contents of the treaty, if in the same document there are clauses of diverse character, only those which enter into the categories enumerated in Article II are considered as annulled. However, the whole treaty falls when it presents the character of an indivisible contract.

IV. The treaties remaining in force and the execution of which continues, notwithstanding hostilities, practically possible, should be observed as in the past. The belligerent states cannot relieve themselves from these except in the degree and for the time demanded by the necessities of the war.

V. Treaties which have been concluded in contemplation of war are beyond the purview of Articles II, III and IV.

VI. Beyond the responsibility which violation of these rules shall entail they should serve to interpret the silence and to fill the gaps in a treaty of peace. In default of a formal clause to the contrary in a treaty of peace it should be held:

1. That treaties affected by the war are definitively annulled;

2. That treaties not affected by the war, whether they have or have not been suspended during the course of hostilities, are tacitly confirmed;

3. That nevertheless, treaties whose clauses find themselves in contradiction with the contents of a treaty of peace are implicitly abrogated;

4. That the express or tacit abrogation of a treaty does not affect retroactively the results produced in the past by the abrogated treaty.

Chapter II

Treaties between belligerent states and neutral states

VII. The arrangements of Articles I to VII apply, in the relations of the belligerent states, to treaties concluded between these and third states with the following reservations:

VIII. When the obligations which bind the belligerent states among themselves have the same objects as their engagements with third states they should be executed in the interests of the latter. Thus collective treaties of guarantee remain in force in spite of war arising between two of the contracting states.

IX. Collective agreements remain in force in the relations of each of the belligerent states with third contracting states.

They cannot be altered by the treaty of peace to the prejudice of third contracting states without the participation or assent of the latter.

X. Treaties concluded between a belligerent state and third states are not affected by the war.

XI. In default of a formal clause to the contrary or of an arrangement leaving no doubt about the intention of the parties, collective treaties relating to the law of war apply only where all the belligerents are contracting parties.

THE RAILROAD PROBLEM

Feb. 21, 1916

Editor of The Journal of Commerce and Commercial Bulletin:

Sir:—Our railway service has, for some time, failed to meet the requirements of our normal commerce. Of late its shortcomings have been accentuated by the move for export trade in manufactures, begun prior to the war. To-day they are blazoned by the need for defense—an army without ample transportation facilities is an army without feet, and it will take longer to supply the one than to train the other.

These shortcomings are largely due to the inability of the companies to obtain the money to repair them, and the companies have long contended that this inability is largely caused by the pressure of Government regulation upon railway finance—both on income and on borrowing power. Adequately to develop our domestic business, strongly, to compete in that worldwide field of industry and finance wherein we find ourselves irrevocably placed, we must rehabilitate our great transportation system, so that we may readily mobilize the products upon which rests the whole fabric of commerce. For years the companies, feeling the pressure of public regulation and foreseeing worse results, were unable to communicate their experience and foresight to those in authority. At last a Congressional resolution for an investigation seems likely to give the companies an opportunity fully to present their "case." Among the major points are vexatious demands of the Commission, exactions of labor, impingements of State commissions on Federal policy, pressure of mail contracts, etc.

Having marshalled their facts, the companies should not rest content with such measure of immediate relief as an accurate presentation of them should bring. Now is the time to grapple with destructive theories regarding the status of railway companies and of railway property and the nature of railway duties. Such theories have long worked harm, and they are cropping out in the valuation proceeding, notably in suggestions by State commissions. Upon the reasonable and legitimate conception of that "public use," with which our railways are affected, are grafted notions that have already depreciated railway service and property, and will, unless cut away, injure both irreparably. Let the companies demonstrate not only to Congress but to the public such proposition of law and fact as these:

I. While a railway company is a public service company, and so is differentiated in many important respects from the generality of business corporations, it is like these subject to the play of economic forces which legislators cannot ignore without inviting disaster.

II. While railways are, like gas and waterworks, "public utilities," their complex and nationally, indeed, internationally, competitive service greatly differentiates them from these simple, local and wholly, or relatively non-competitive services. Unless these differences are promptly demonstrated, the parochial experience and theories of gas and water "experts" may play havoc with our arterial transportation system.

III. The paramountcy of the Federal over the State service of railways, long since established, in fact, should be sufficiently established in law to shut off interfering currents of State regulation. A difficult task, but one, I think, quite possible without amending the Constitution.

IV. The railways should be definitely taken out of the anti-trust act, for they were dragged in by a judicial construction, which experience has quietly shelved for the good of the service. The Federal regulation laws should be revised and be consolidated into an intelligible and intelligent code that will promote the better service so urgently needed.

The threat of public ownership, if not ominous, has become sufficiently disturbing in the matter of further investment to demand the attention which this inquiry will secure. Recognizing the bare constitutional power of the Government to acquire the railways, let the companies challenge the few partisans and the many prophets of public ownership to formulate a constitutional, equitable and practical procedure, and to demonstrate that, under Government auspices, the railways will give to the people a better service at no greater cost—I say "to the people," because these are not to be flim-flammed for heavier taxes in order to repair deficits due to "popular" rate reductions to shippers. Public ownership is in the visionary stage. Now, you cannot profitably analyze or criticise a vision, so let us have a definite plan for taking over the lines by agreement, an alternative plan for condemning them, a sketch, at least, of the machinery of Government control and a thoughtful forecast of results.

The resolution in reference to "foreign commerce" may require some consideration of the ship question, and I shall miss my guess if railway interests shall not find it advisable to deal with some of the big problems of international commerce intensified or suggested by the war. In this relation, I hope Mr. Kahn's notable discussion of the railway question prefigures the co-operation of banking interests in the railway case. The railway has, on the private side, always been, fundamentally, an investor's proposition. This phase is conspicuous to-day, and here, as well as in the international problems, the banker's help will be invaluable.

WHY FEDERAL RAILWAY REGULATION NEEDS OVERHAULING

Mr. Carman F. Randolph on the Urgency of the Military Reasons for Single Control

(New York "Sun," August 14, 1916)

The railway system of the United States is, notoriously, physically unable to meet the needs of commerce. Of ominous concern its shortcomings clog our military preparation.

Lack of money lies at the root of the trouble, and while the system shares at the moment in the general improvement in trade this will not raise railway credit to the point of attraction for the

huge sums required to bring it up to the normal needs of commerce and the not impossible demands of war.

The fact that railway credit is in a backward state after nearly thirty years of a Federal regulation, increased in intimacy and severity within the past decade, commends reformation of its spirit and method.

The companies do not look for changes that will draw from their own to the Government's shoulders responsibility for an adequate service. On the contrary, they crave more responsibility, more freedom, not less. Most severely do they criticise public regulation precisely at those points where it hampers the full performance of their responsibilities. They do not ask the Government to guarantee an adequate service. This would, logically, invite the Government to take over a property which the owners had implicitly confessed themselves unable to manage. They do ask that Government shall not hinder capable owners of a private property in performing the public service they were organized to render.

The companies do not charge the shortcomings of the system wholly to public regulation, but repeatedly have they pointed out substantial defects and predicted the serious consequences which are now experienced.

At last public realization of the truth that public regulation needs overhauling promises that as our banking system has been set on the road to better service so will our railways. The Senate joint resolution for an inquiry into the railway situation having at last been approved by the House, the companies are encouraged to prepare a comprehensive "case" for a better regulation—a "case" that will appeal not only to legislatures and courts but to a public opinion that will as heartily respond to straight-forward reasoning as it will assuredly shy from an "accelerated" propaganda.

Of the major points of the railway case none will more beneficially influence the solution of the problem than that which commends a single power regulation of our physically single railway system, an assumption of Federal jurisdiction over everything the States actually do or may regulate to the disparagement of a unified regulation. For example among the matters ripe for complete Federal jurisdiction are the equipment of all trains and their unobstructed, safe and convenient movement; all freight and passenger rates.

These matters are now governed in greater or less degree by Federal authority, and if this authority may constitutionally be extended so as to exclude State regulatory functions which now split them each will pass from a discordant to a homogeneous régime, to the advantage of the service.

I believe this extension may be lawfully made, and find encouragement in a broadening judicial construction of the Federal commerce power, especially marked in recent opinions of the Supreme Court. In Southern Railway v. Behrens (222 U. S., 27) the court said:

"The several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for what-

ever brings delay and disaster to one or results in disabling one of its operatives is calculated to impede the progress and imperil the safety of other trains."

In Texas and Pacific Railway v. Rigsby, April 17, 1916, Mr. Justice Pitney, speaking for the whole court and referring to Federal statutes "requiring certain safety appliances to be installed on railroad cars used upon a highway of interstate commerce irrespective of the use (interstate or intrastate) made of any particular car at any particular time," said:

"Without the express leave of Congress, it is not possible, while the legislation stands, for the States to make or enforce laws prescribing the character of the appliances that shall be maintained or imposing penalties for failure to maintain them."

In the Shreveport rate case (Houston, etc., Railway v. U. S., 234 U. S. 342) the court said:

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other it is Congress and not the States that is entitled to prescribe the final and dominant rule (351)."

The court does not "say that Congress possesses the authority to regulate the internal commerce of a State as such, but that it does possess the power to foster and protect interstate commerce and to take all measures necessary and appropriate to that end, although intrastate transactions of interstate carriers may thereby be involved" (353). "It was recognized," said the court, "at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters, and where the interests of interstate commerce are involved the judgment of Congress and of the agencies it lawfully establishes must control" (360).

"The power to deal with two kinds of rate (interstate and intrastate), as a relation, rests exclusively with Congress—the States cannot fix the relation of the carriers' interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority" (354).

Considering especially the last citation from the Shreveport case we mark a constant, if not at all points a conspicuous, relation between State and Federal rates. For instance, a reduction of rates on coal from the Pennsylvania mines to Philadelphia may or may not in itself appreciably affect the great fabric of interstate rates. Understanding, however, that under present conditions forty-eight States can reduce local rates to a point just short of taking property without due process of law, unless the reduction can be affirmatively proved to derange an interstate schedule, multiplying infinitely such instances in what is estimated to be about one-fourth of the country's traffic, we perceive impingements upon the interstate rate fabric moving from forty-eight quarters and combining seriously to impair its solidarity. Now when the Supreme Court intimates that State-made rates shall, on principle, respect Federal standards it suggests a right in Congress to apply the principle by conditioning such rates upon the approval of a Federal authority. Awkward at best, this contrivance would be intolerable were not the Federal authority in case it disapproved a rate au-

thorized to name the correct one. Otherwise the State would have to guess again. But why take a round-about way when a straight one is open? Why drag a rate through two technically distinct jurisdictions when one of these alone is authoritative? A Federal authority competent to regulate interstate rates on review, because they are really a part of the general rate system, may be empowered to regulate them in the first instance. This should be the practice.

If the Federal commerce power shall fall short of justifying as wide a range of Federal authority as the unification of our railway system demands, the military power of the republic may be brought in to close the gap.

Never has there been so striking a demonstration of the relation of railways to the common defence as in this day, where our deficiencies in each are so flagrant, and it is a weighty argument for the betterment of our system that the ampler the facilities for mobilization the smaller the standing army we shall need.

Repressing in their Constitution the dominance of military power in peace, jealous of its arrogance in war, the people of the United States, urged to an armed preparation, whose broad and complex foundation must be laid in peace if it is to serve in war, find in their Federal charter authority to extend Federal regulation wherever State regulation may directly or indirectly impair the national efficiency of the railway system.

I am of the opinion that the military argument for a single power regulation of railway transport to whatever extent is really demanded by national interest may be usefully employed in the courts, and with broader effect be asserted by Congress as a reason for legislation. And the argument should make a strong appeal, because in perfecting our great transportation system for the emergency of war we shall necessarily increase its usefulness in the daily service of peace.

RAILWAYS IN CONGRESS

Nov. 17, 1916

To the Editor of The New York Times:

The sub-committee of Congress, appointed under the joint resolution of July 20 for an investigation of the conditions of interstate and foreign commerce, will convene on Nov. 20. Among the directions given to this committee is "to report as to the wisdom or feasibility of Government ownership of [railroads] and as to the comparative worth and efficiency of Government regulation and control as compared with Government ownership and operation."

Senator Newlands, Chairman of the sub-committee, presents a tentative program of the investigation, including these among other questions: "(a) The practical results of Government ownership both as to efficiency and economy where actually practiced; (b) Whether Government ownership is compatible with our system of Government, and what its effects will be on our governmental institutions; (c) Whether a system of Government ownership will suit local needs; (d) A practical method of securing Government

ownership, whether by purchase or condemnation of properties or by purchase or condemnation of bond or stock issues, or otherwise."

It is highly and most satisfactorily significant that the President, urging the investigation of the railroads in his annual message of December last, did not mention Government ownership as a possible alternative to the present system of regulation. "There has been," said he, "reason to fear that our railroads would not much longer be able to cope with [the problem of transportation] successfully as at present equipped and co-ordinated," and, assuming the continuance of the present system, he inquired, "whether there is anything else we can do that would supply us with effective means, in the very process of regulation, for bettering the conditions under which the railroads are operated and for making them more useful servants of the country as a whole."

In harmony with the President's lead, the joint resolution as introduced did not call for consideration of Government ownership. This was proposed on the floor of the Senate and was finally incorporated in the resolution. Fortunately, the proposition is stated in its logical form "ownership and operation." This cuts out consideration of a seductive but mischievous suggestion—Let the Government take over the lines and lease them to responsible private companies in the hope of avoiding the political embarrassments and the poor service so widely and so justly apprehended from Federal management. Even if the Government could or would offer a lessee a sufficiently attractive freedom of action, or, restricting this freedom, guarantee a fixed pecuniary return, there is one consideration at least which discredits Federal ownership and company management.

The successful operation of American railways depends largely on a well-placed and substantial power of initiation and on a definite attribution of responsibility. Company ownership and operation permit a beneficial co-ordination of the power and the responsibility which would be precluded by vesting ownership in the Government and operation in a company.

The order of investigation, the comparative urgency of the several subjects, are wholly within the committee's determination, but I trust that the committee will, before reporting on Government ownership, invite responsible representatives of a substantial public opinion to present an elaborate statement covering the points noted by Senator Newlands—especially formulating "a practical method of securing Government ownership whether by purchase or condemnation of properties or by purchase or condemnation of bond and stock issues, or otherwise." Having, I believe, some special knowledge of the rules of eminent domain and, I hope, a fair appreciation of the law of the Constitution, I am curious to study the novel proposition in that precise statutory form to which it must be reduced if it is to be intelligible.

Public ownership, long hovering in the air, has added something to the general aversion of capital from railway enterprise, and it is a strong factor in the Socialist propaganda. Now for the first time brought within range of official consideration, its advocates are challenged to explain what they want, why they want it,

how they would get it, and, above all, to demonstrate that public operation of our railways would give the people a better service. Meanwhile the companies will thoroughly study Senator Newlands's points, so as to be prepared for any event.

Surely the committee will not hold up reports on specific practical problems of Government regulation until the dream of Government ownership shall be reduced to concrete form and then considered. For these problems involve that speedy improvement of the railway service which is the sole object of the President's message and the main object of the committee's being. Mr. Newlands thus lists the problems: railway labor; reconstruction of Interstate Commerce Commission procedure, with perhaps the creation of another administrative body, for the more convenient handling of business; single Federal jurisdiction over all rates; Federal regulation of security issues; Federal incorporation of railways.

If the essential complexity of these problems, to say nothing of conflicting opinions, renders uncertain the satisfactory solution of all of them during the forthcoming short session of Congress the President's promise in regard to labor legislation should be measurably realized. For the rest I should say that a reconstruction of administrative functions and procedure should not overtax Congress, and it should be possible to secure the measure of prime importance—Federal control of rates.

Whatever Congress can do in the few weeks of its existence to promote the efficiency of our railway service will vastly improve the efficiency of the Republic in the troubled years ahead.

THE RAILROADS AND NATIONAL DEFENCE

March 11. 1916

To the Editor of The Evening Post:

SIR: Many of the ideas looking to that greater efficiency of our railway system, which seems at last to be on the way to early accomplishment, must find precise and authoritative expression in statutes.

Experimenting along the line of constructive legislation I find that where efficiency is to be gained by expanding Federal jurisdiction there are, of course, a number of points that will be criticised as unconstitutional—Federal impingements upon State rights. Some of these criticisms which once would have embarrassed many lawyers—myself included—have in late years been materially weakened by the palpable need of a broader sweep of Federal power for the good of the service, and they are now blunted by this great war which, tremendously altering actual conditions everywhere, has in many directions compelled corresponding changes in theory.

Considering this change with regard to our railway system we cannot say that the warnings of the war discredit State rights or State interests in respect of its operation, but we must understand that the war has trumpeted Federal duties whose proper execution will promote, and not impair, the real interests, and therefore the

real rights, of our State communities, which in the matter of the common defence are merged into the nation.

Now the common defence to-day demands not only vast transportation facilities in the event of war, but their pre-development in aid of conserving the enormous quantities of war material, much of it novel, which present experience shows must be available within our borders. For instance, the country is being combed for certain raw materials which, wherever found, must be put in the way of distribution.

The logic of the war does not, as some will have it, drive us into militarism, but it sternly advises a sober preparation which, in the case of the railway system, as in all cases, is to be approached from the standpoint of Federal duty, with full assurance that its due performance cannot disparage rights of the States.

March 10.

THE ENEMY

April 2, 1917

To the Editor of The New York Times:

In a newspaper communication of Aug. 3, 1914, I predicted for the United States neutrality to the end of the war, "unless recklessly flouted or compelled to avert a blow against civilization imperiling their interests."

Occasional acts of piracy offered us long since lawful opportunity for war against Germany if we wanted it. These have culminated in calculated aggression on the high seas, aggravated by conspiracy and intrigue in our own and neighbor countries. For these conspicuously mandatory causes Congress is about to declare the United States at war. For what sort of a war will the President demand moral and material support from Congress. Will his demand measure up to the real portent of the hour, to the full duty of the Republic What he wants he will get. The people await his word.

A combination of sluggish and sinister forces is striving to hold the Republic down to chasing pirates and arresting conspirators. The implications of this course are obvious: No closer co-operation with the Allies than is needed to clear the seas of U-boats; withdrawal from the conflict if this be accomplished before the end of the great war; if not, no further concern in the immediate outcome than a recovery of pecuniary damages, with perhaps some amiable phrase of "freedom of the seas"—a war to wipe out personal insult by collecting a little blood and money. Once in the fight, the inexorable march of events would sooner or later leave such notions behind, but they must not clog our initial preparation. Nor will they if the President, contemning any eleventh-hour promises regarding U-boats, shall proclaim to a receptive people that our enemy is the Prussian "State," our purpose its extirpation.

Whatever may be said in praise of Prussia during the few centuries of her development, in recognition of her crowning work—the German Empire—the Prussian concept of the "State" has, automatically rather than intentionally, bred the political cancer of the world. Until this be cut out there shall be no hope of peace in the world or frank and equal intercourse among the peoples. Small States, whose integrity means much to civilization, are in peril. Great ones may hold their place only by reluctantly borrowing from the Prussian model.

It appears that the Allies cannot, unaided, cut out the cancerous "State" save by a sacrifice so appalling that our great Republic may not stand at ease while the democrats in Europe fight the "dark forces" of autocracy. For to this complexion has the war come at last. Whether the revolution in Russia shall at the moment strengthen or weaken the military position of the Allies, whether for the moment it may run too fast for stability, there will be no permanent reaction unless, peradventure, the Prussian "State" so mischievously planted in Russia shall find an ally in a sluggish United States.

If realization of the high opportunity and purpose of the war come at once——it must come later—the Republic will stagger the Prussian "State" and strengthen the Allies to the conquering point by the magnitude of its preparation and the generous breadth of its participation—making common cause with the Allies in their operations against Germany and a common peace so far as the cancerous "State" is concerned, meanwhile giving them such aid as may be agreed on after close and friendly conference.

March 29, 1917.